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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 973

FOOD FAIR STORES, INC., a Foreign Corporation Authorized to Do Business in Florida, and POMPANO FAIR REALTY CO., a Florida Corporation,
Appellants,

vs.

THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA.

APPELLEE'S MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No.

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Appellants,

vs.

THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA,
Appellee.

MOTION TO DISMISS APPEAL

COMES NOW the Appellee, ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA, by and through its undersigned attorneys, and moves this Honorable Court to Dismiss the Appeal of Appellants in this cause and states as grounds therefor:.

1. This appeal, having been taken from the Supreme Court of the State of Florida and not from the District

Court of Appeal, Second District, State of Florida, is not within the jurisdiction of the Supreme Court of the United States because not taken in conformity to 28 U.S.C.A., Sec. 1257 (2), and the Rules of the Supreme Court of the United States; or, in the alternative,

2. This appeal does not present a substantial federal question.

Respectfully submitted,

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THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA,
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ON APPEAL FROM THE SUPREME COURT OF FLORIDA.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL

Constitution and Statutes Involved

With respect to Appellee's Motion to Dismiss Appeal, the following Constitutional and Statutory provisions are involved: (1) Article V, Constitution of the State of Florida; (2) 28 U.S.C.A., Sec. 1257(2). Both are set forth in Appendix A hereto.

Questions Presented by Appellee's Motion to Dismiss

(1) Whether this appeal, having been taken from the Supreme Court of the State of Florida, is within the jurisdiction of the Supreme Court of the United States as required by 28 U.S.C.A., Sec. 1257(2)?

(2) Are the questions presented in the jurisdictional statement of the Appellants substantial federal questions?

Statement of the Case

Appellants' Statement of the Case is quite accurate; however, Appellee would respectfully point out that consideration of this cause by the Supreme Court of the State of Florida was had pursuant to a Petition for Writ of Certiorari alleging that the opinion of the District Court of Appeals, Second District, State of Florida, was in direct conflict with certain enumerated decisions of the Supreme Court of Florida and with the rule of law set forth in said cases. Pursuant to Article V, Section 4, of the Constitution of the State of Florida, the issuance of the Writ in such cases is discretionary and the Supreme Court of Florida, in denying the Petition, passed only upon the jurisdictional question and not upon the merits of the cause. The importance of this matter will be treated *infra* herein.

Argument

(1) Whether this appeal, having been taken from the Supreme Court of the State of Florida, is within the jurisdiction of the Supreme Court of the United States as required by 28 U.S.C.A., Sec. 1257(2)?

In the State of Florida, the circuit courts and certain other inferior courts have jurisdiction over all trial matters, with the circuit courts also having certain limited powers of review as an appellate court. Constitution of the State of Florida, Article V, Sections 1, 6, 7, 8, 9, 10 and 11. Except in certain enumerated cases, appeals or petitions for certiorari from such courts are taken to one of three District Courts of Appeal, depending upon the district in which the circuit court is located. Constitution of the State of

Florida, Article V, Sections 4, 5 and 26. In Article V, Section 4, Constitution of the State of Florida, it is provided as follows, in pertinent part:

"SECTION 4. Supreme Court.

(1) . . . . .

(2) JURISDICTION.

. . . . . The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law."

As pointed out on pages 6 and 7 of Appellants' Jurisdictional Statement, Appellants filed in the Supreme Court of Florida a Petition for a Writ of Certiorari from the decision of the District Court of Appeal, Second District, State of Florida (hereinafter called District Court), reciting in said Petition that the District Court of Appeal was presented with, *inter alia*, the following point of law:

"Whether the Court below erred in determining that an ordinance of the City of Pompano Beach prohibiting Appellant (sic) from erecting a gasoline filling station within seven hundred fifty feet of another station along the same street, while allowing others to do so and while permitting gasoline filling stations only one hundred fifty feet along the same street from public assemblies, theatres, auditoriums and other places where people congregated, gave equal protection of the law as provided by Sections 1 and 12 of the Declaration of Rights of the Florida Constitution and the Fourteenth Amendment to the Constitution of the United States of America."

and that on these points of law the District Court found nothing unreasonable in the ordinance. It is then pointed out that the Supreme Court of Florida, without opinion on the merits, on November 5, 1962, ordered that Appellants' Petition for Certiorari be denied. It was not pointed out, however, that the Appellants' Petition for Certiorari to the Supreme Court of the State of Florida was predicated, as the Constitution of Florida requires, upon the allegation that the decision of the District Court was in direct conflict with several enumerated opinions of the Supreme Court of Florida on the same point of law. The Supreme Court of Florida decided that the Appellants had failed to clear the first hurdle, that of jurisdiction based upon an alleged direct conflict on the same point of law, and consequently the Petition for Certiorari was denied for lack of jurisdiction. The merits of the constitutional questions which Appellants set forth as having been raised before the District Court, and the question of whether that District Court erred in its decision thereon, were never considered or decided by the Supreme Court of Florida. Appellee filed its brief in the Supreme Court of Florida directed only to the jurisdictional question and was never requested nor required to file a brief on the merits.

The case of *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U.S. 157, 74 S. Ct. 396, 98 L. Ed. 583, involved a suit instituted against Texas state officials in a state district court seeking a determination that a state tax statute, as applied to the appellants, was violative of the commerce clause of the United States Constitution. The district court entered judgment for the appellants but the Texas Court of Civil Appeals reversed, holding that the tax statute as applied to the appellants was constitutional. The Supreme Court of the State of Texas refused appellants' applications for writs of error. It was pointed out in the opinion of the Supreme Court of the United States that the

effect of the refusal to grant the writs of error constituted a determination by the Texas Supreme Court, under Texas statute and rules of procedure, that the judgment of the Court of Civil Appeals was a correct one and the principles of law declared in the opinion correctly determined. The appellants were uncertain whether their appeal to the Supreme Court of the United States was properly from the Court of Civil Appeals or the Supreme Court of Texas under 28 U.S.C.A., Sec. 1257(2), which statute requires that appeals be taken from the highest court of a state in which a decision could be had. A a result of this uncertainty, appellants appealed from each of the courts.

The Supreme Court of the United States, after postponing a determination of the jurisdictional question to the hearing of the cases on the merits, had the following to say, per Justice Clark, at 74 S. Ct. 397:

> "We think that appeals in these cases were properly from the Court of Civil Appeals. In American Ry. Exp. Co. v. Levee, 1923, 263 U.S. 19, 44 S. Ct. 11, 12, 68 L. Ed. 140, the Supreme Court of Louisiana had refused a writ of certiorari to the State Court of Appeal 'for the reason that the judgment is correct.' Mr. Justice Holmes, speaking for a unanimous Court, said:
>
> "'* * * [U]nder the Constitution of the State the jurisdiction of the Supreme Court is discretionary * * * and although it was necessary for the petitioner to invoke that jurisdiction in order to make it certain that the case could go no farther, * * * when the jurisdiction was declined the Court of Appeal was shown to be the highest Court of the State in which a decision could be had. Another section of the article cited required the Supreme Court to give its reasons for refusing the writ, and therefore the fact that the reason happened to be an opinion upon the merits rather than some more technical consideration, did not take from the refusal its ostensible character of declining juris-

diction. 'Western Union Telegraph Co. v. Crovo, 220 U.S. 364, 366, 31 S. Ct. 399 [400]; 55 L. Ed. 1082. Of course the limit of time for applying to this Court was from the date when the writ of certiorari was refused.' 263 U.S. at pages 20-21, 44 S. Ct. at page 12.

In Lone Star Gas Co. v. State of Texas, 1938, 304 U.S. 224, 551, 58 S. Ct. 883, 82 L. Ed. 1304, with the present Texas procedural provisions in effect this Court's mandate issued to the Court of Civil Appeals in a case where the State Supreme Court had 'refused' writ of error. See also United Gas Public Service Co. v. State of Texas, 1937, 301 U.S. 667, 57 S. Ct. 921, 81 L. Ed. 1332.

Accordingly the appeals in Nos. 199 and 201, from the Supreme Court of Texas, are dismissed. We proceed to consider Nos. 198 and 200."

It is clear from a reading of the applicable provisions of the Constitution of the State of Florida that the jurisdiction of the Supreme Court upon a Petition for Certiorari alleging a direct conflict with a decision of another District Court or of the Supreme Court of Florida on the same point of law is discretionary. It is also clear by decision of the Supreme Court of the United States that in such cases, where the Supreme Court of a state, or other court of final appellate jurisdiction by whatever name called, declines jurisdiction that the next previous appellate court, which in this case is the District Court, becomes the highest court of the state in which a decision could be had for purposes of determining the jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C.A., Sec. 1257(2). Appellants have taken their appeal from the Supreme Court of Florida, as the Jurisdictional Statement and supporting documents demonstrate, rather than from the District Court, and consequently their appeal is not within the jurisdiction of the Supreme Court of the United States because

it has not been prosecuted in conformity to statute and to the Rules of the Supreme Court of the United States.

(2) Are the questions presented in the jurisdictional statement of the Appellants substantial federal questions?

It is too elementary a proposition for extensive citation of authority that a substantial federal question necessary to the determination of the cause must have been presented to and passed upon by the highest state court having jurisdiction before the Supreme Court of the United States will take jurisdiction to review it. *Durley* v. *Mayo*, 351 U.S. 277, 76 S. Ct. 806, 100 L. Ed. 1178, reh. den. 352 U.S. 859, 77 S. Ct. 22, 1 L. Ed. 2d 69; *Palmer Oil Corporation* v. *Amerada Petroleum Corporation*, 343 U.S. 390, 72 S. Ct. 842, 96 L. Ed. 1022.

Before discussing the three reasons which Appellants set forth in their jurisdictional statement to establish a substantial federal question, Appellee would first point out that certain criteria have been established by previous decisions for testing the validity or invalidity of zoning ordinances. It has been held that the legislative determinations of a city council as to zoning regulations should not be interfered with by the courts unless they are clearly arbitrary and unreasonable. *Goreib* v. *Fox*, 247 U.S. 603, 47 S. Ct. 675, 71 L. Ed. 1228; *Zahn* v. *Board of Public Works of City of Los Angeles*, 274 U.S. 325, 47 S. Ct. 594, 71 L. Ed. 1074. And in the landmark case of *Village of Euclid, Ohio*, v. *Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, it was concluded that if the validity of zoning classifications be fairly debatable, the courts should allow the determination of the legislature to prevail. See also *Standard Oil Co.* v. *City of Marysville*, 279 U.S. 582, 49 S. Ct. 430, 73 L. Ed. 856, interpretation of opinion denied 282 U.S. 797, 51 S. Ct. 38, 75 L. Ed. 718. And in *Nectow* v. *City of Cambridge*, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842,

it was stated that a court should not set aside the determination of public officers in zoning matters unless the action complained of has no basis in reason and consists merely of an arbitrary and irrational exercise of power having no substantial relation to the public health, safety, welfare and morals.

Appellants assert that the questions in this cause are substantial for three reasons, the first of which alleges that the ordinance in question contains an unreasonable classification resulting in arbitrary discrimination against them and in favor of others *similarly situated.* The discrimination allegedly exists in the exception found in the ordinance which eliminates from its requirements, property or properties leased or owned in fee simple as evidenced by deed or lease of record prior to August 13, A.D. 1957, by a bonded gasoline distributor or his agent, dealer, lessee or consignee.

In the case of *Village of Euclid, Ohio,* v. *Ambler Realty Co.,* 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, this Court upheld and approved the power of a municipality to create zoning districts and to define the classifications or uses which would be allowable in each such district. The applicability of the requirements and restrictions contained in such zoning ordinances must, of necessity, be prospective rather than retrospective, as to deprive an individual of a substantial existing use by the passage of an ordinance without providing for compensation would be a gross deprivation of property without due process of law. Thus it is that substantial, existing uses, which are perhaps more appropriately termed non-conforming uses, in being at the time of the adoption of a zoning ordinance are exempted from its requirements, in many cases specifically in the adopting legislation and in others at least by existing notions of constitutional guarantees; and, this is true to the

extent that the allowance of the continuance of such pre-existing uses has been held not to constitute discrimination tending to create a monopoly nor to be a denial of equal protection under the Fourteenth Amendment to the United States Constitution to those persons within the zone not having such uses but desiring them subsequent to the adoption of the zoning ordinance. *Sampere* v. *City of New Orleans*, 166 La. 776, 117 So. 827, aff'd without opinion, 279 U.S. 812, 49 S. Ct. 262, 73 L. Ed. 971. The appellants in this case are no more similarly situated to the class exempted in the ordinance than are persons not possessing non-conforming uses similarly situated to those possessing such uses at the time of the adoption of a zoning ordinance. The legislative authority of the City of Pompano Beach, Florida, in its legislative understanding of local problems, recognized at the time of the adoption of the zoning ordinance in 1957 that there had already accrued to a class of persons substantial rights based upon substantial plans and substantial monetary investments directed toward the construction of gasoline filling stations and, for the purpose of protecting those rights as property within the ambit of constitutional shelter, the exempted class was established. Contrary to the contention of Appellants, the ordinance was designed to protect the property rights of a legitimate class of persons and not to deprive Appellants of their property or of the equal protection of the laws, nor does it so deprive Appellants in its operation. Appellants' claim that they are similarly situated to the exempted class is a bare assertion of a conclusion of law without basis in fact or reason.

It should also be noted that under this first point the Appellants attempt to assert the ground that there is no basis for differentiation between bonded gasoline distributors who owned or leased property within the area prior to August 13, 1957, and bonded gasoline distributors who

became owners or lessees after that date and were not agents, dealers, lessees or consignees of the former. Clearly Appellants, admittedly not being bonded gasoline distributors, or agents, dealers, lessees or consignees thereof, are not members of the class entitled to complain about an alleged discriminatory classification. *First National Bank* v. *Louisiana Tax Commission*, 289 U.S. 60, 53 S. Ct. 511, 70 L. Ed. 1030.

The second point raised by Appellants, while ostensibly concerned with the question of whether the distance limitation between gasoline stations as contained in the ordinance is reasonably related to the evil sought to be corrected, is inextricably interwoven with the previous argument based upon alleged discriminatory classification. Suffice it to say that the thrust of the argument is aimed solely at the inherent hazards of gasoline filing stations consisting of fire, explosion, noxious odors, fumes, "and so forth". No attention is given to other equally important considerations of the public health, welfare and safety as was so concisely pointed out by the District Court in its opinion in *Food Fair Stores, Inc.*, v. *Zoning Board of Appeals of the City of Pompano Beach, Florida*, 143 So.2d 58, 60 (Fla. App. 1962), wherein it stated:

> "Extensive testimony was taken in this case which included testimony of a professional traffic engineer, whose summarized testimony was to the effect that it is desirable to separate pedestrian and vehicular traffic; that marginal access points upon streets create greater traffic problems; that there is a traffic problem at the intersection where the gasoline station proposed by appellants was to be located and that the investment of the public in relation to U. S. Highway No. 1, an arterial highway, would thereby be destroyed; and that the indiscriminate construction of drive-in type businesses along arterial streets and on corners has a detrimental effect on vehicular and pedestrian traf-

> fic. Also testifying was the Director of Planning for Broward County, who stated that the planners gave special consideration to gasoline stations because of problems peculiar to such businesses, including fire hazards, traffic hazards, pedestrian hazards and related problems; the necessity for complete prohibition of gasoline stations in certain areas; and the concern for certain esthetic considerations. There was also testimony concerning the location of public schools in close proximity to the intersection in question. The appellants strenuously argued that this zoning along distinct lines was done to create a monopoly, etc., in certain situations. The Circuit Judge specifically found against the appellants on this question."

Fire hazard is not the only consideration to which the public health, safety and welfare is entitled in the enactment of zoning ordinances.

As to the question of a discriminatory classification as argued under point number two of Appellants' three points, the arguments already made under point number one should suffice without repetition.

Regarding point number three, Appellee would be less than candid if it did not agree that federal constitutional guarantees should be zealously guarded by federal courts and that inaction or evasion of duty by state courts as to federal constitutional questions should not be allowed to defeat the jurisdiction of the Supreme Court of the United States as to those questions. Appellee asserts, however, that both the circuit court judge and the District Court fully considered the constitutional arguments advanced by Appellants here and found them not to be substantial. With those findings Appellee heartily concurs. As pointed out above, the Supreme Court of Florida did not skirt, fail or refuse to consider the federal constitutional questions involved in the cause, but simply refused jurisdiction

pursuant to the dictates of the Constitution of the State of Florida.

For the foregoing reasons, Appellee respectfully prays and urges that the jurisdiction of this Court has not been properly invoked in accord with the statutes and rules appertaining thereto and there is no substantial federal question divulged by the jurisdictional statement in support of this appeal and that consequently, its Motion to Dismiss should be granted.

Respectfully submitted,

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APPENDIX A

28 U.S.C.A., Sec. 1257. State Courts; appeal; certiorari.

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) . . . . .

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Florida Constitution, Article V, Section 4(2).

SECTION 4. Supreme Court.—

(1) . . . . .

(2) JURISDICTION. . . . . .

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.

PROOF OF SERVICE

I, ROBERT B. COCHRAN of the City of Pompano Beach, Florida, attorney of record for THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA, appellee herein, depose and say that on the 24th day of April, 1963, I served a copy of the attached Appellee's Motion To Dismiss And Brief In Support Thereof, as required by Rule 16 of the Rules Supreme Court United States, on Food Fair Stores, Inc., a Foreign Corporation authorized to do business in Florida, and Pompano Fair Realty Co., a Florida Corporation, appellants herein, by mailing said copy in a duly addressed envelope with first class postage prepaid to the appellants' attorney of record, Harry Shapiro, Esq., care of Alfred Aronovitz, Esq., Aronovitz, Aronovitz and Haverfield, at 748 Seybold Building, Miami, Florida.

ROBERT B. COCHRAN

ROBERT B. COCHRAN

SUBSCRIBED AND SWORN TO before me at Pompano Beach, Broward County, Florida, this 24th day of April, 1963.

Pamela Kriegel

NOTARY PUBLIC

My commission expires:

NOTARY PUBLIC, STATE of FLORIDA at LARGE
MY COMMISSION EXPIRES JAN. 25, 1966